87-1406

No. .....

In The

Supreme Court of the United States

October Term, 1987

SHIPCO 2295, INC., SHIPCO 2296, INC., SHIPCO 2297, INC., SHIPCO 2298, INC., AND SPC SHIPPING, INC.,

Petitioners,

versus

AVONDALE SHIPYARDS, INC., AND ALLGEMEINE ELEKTRICITATS GESELLSCHAFT TELEFUNKEN,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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January, 1988

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QUESTION PRESENTED FOR REVIEW

Does a rule that absolutely deprives a shipowner from asserting a cause of action in maritime products liability, based either on negligence or strict liability, for damage to a vessel against a shipbuilder for a defect in the vessel, or against a subcontractor in respect of a single defective component of a vessel, unless damage resulting from the defect extends beyond the vessel itself, conflict with the decision of this Court in *East River Steamship Corp. v. Transamerica Delaval, Inc.*?

LIST OF PARTIES

The parties to the proceeding in the Court of Appeals for the Fifth Circuit were:

Allgemeine Elektricitats Gesellschaft Telefunken
Avondale Shipyards, Inc.
Shipco 2295, Inc.[1]
Shipco 2296, Inc.[1]
Shipco 2297, Inc.[2]
Shipco 2298, Inc.[2]
SPC Shipping, Inc.[3,4]

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1 Shipco 2295, Inc. and Shipco 2296, Inc. have no subsidiaries. Their parent is Chas. Kurz & Co. Inc. Their affiliates are Keystone Shipping Co., Kurz-Allen, Inc., Kurz Foundation, New England Collier Company, Timbo Shipping Ltd. and Wilmington Liquid Bulk Terminals, Inc. The only other affiliates are wholly owned subsidiaries of the parent.

2 Shipco 2297, Inc. and Shipco 2298, Inc. have no subsidiaries. Parent corporations are International Charterers, Inc. and Interocean Management Corporation. Their affiliates are American Liberty Shipping, Inc. and Colonial Carbor Associates, Inc. The only other affiliates are wholly owned subsidiaries of the parent corporations.

3 SPC Shipping, Inc. has no subsidiaries. Parent corporations are The Standard Oil Company, BP America Inc., BP International Ltd. and British Petroleum, Ltd., Plc. The only affiliates are wholly owned subsidiaries of the parent corporations.

4 In addition to the listed parties, subrogated underwriters of plaintiffs and intervenor have an interest in the outcome of the litigation and include:

Allstate Insurance Company, American Home Assurance Company, American Marine Insurance Group, Arkwright-Boston Manufacturers Mutual Ins. Co., Donald H. Miller, Inc., Duncanson & Holt, Inc., Employers Casualty Company, Employers Insurance Company of Wausau, Folksam International Ins. Co., Ltd., Highlands Insurance Company, Institute of London Underwriters, Insurance Company of North America, Netherlands Insurance Company, New Hampshire Insurance Company, New York Marine Managers, Nippon Fire & Marine Insurance Company, Ranger Insurance Company, Reed & Brown, Scottish Lion Insurance Co., Ltd., Seven Provinces Insurance Co., Ltd., Terra Nova Insurance Co., Ltd., Travelers Indemnity Company, Underwriters at Lloyd's, United States Fidelity & Guaranty

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In The

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October Term, 1987

SHIPCO 2295, INC., SHIPCO 2296, INC., SHIPCO 2297, INC., SHIPCO 2298, INC., AND SPC SHIPPING, INC.,

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OPINIONS BELOW

The opinions below are contained in the appendices to the Petition. Appendix "A" is the decision of the Court of Appeals for the Fifth Circuit rendered on August 28, 1987. Appendix "B" is the denial by the Court of Appeals for the Fifth Circuit of petitioners' Suggestion of *En Banc* Rehearing which was entered on October 29, 1987. Appendix "C" is the judgment of the Court of Appeals for the Fifth Circuit which was entered on August 28, 1987. Ap-

pendix "D" is the Opinion of the District Court dated March 25, 1986. Appendix "E" is the judgments entered by the United States District Court for the Eastern District of Louisiana dated February 27, 1986.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on August 28, 1987, and rehearing *En Banc* was denied on October 29, 1987.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

In these consolidated cases, petitioners seek recovery against Avondale Shipyards, Inc. ("Avondale") and Allgemeine Elecktricitats Gesellschaft Telefunken ("AEG") of physical damages and other losses in respect of four 164,000 DWT crude oil tankers. Avondale was the builder of the vessels, and AEG was the designer of the steering gear which was incorporated by Avondale into the vessels of petitioners.

After the vessels were placed in service, defects in one or more particular components of the vessels, including units designed by AEG, caused damages which extended to unrelated, properly functioning components and systems of the vessels.

Following a trial on two issues, as directed by the District Court, the District Court entered an opinion ruling in favor of Avondale on those issues and, at the same time, granted a prior motion of Avondale for summary judgment and a motion by AEG for judgment on the pleadings, dismissing all claims of petitioners against Avondale and AEG. Subsequent to entry of judgments in favor of Avondale and AEG, petitioners appealed to the Court of Appeals for the Fifth Circuit.

A panel of the Court of Appeals, citing this Court's decision in *East River* which had been rendered subsequent to the entry of judgments by the District Court, affirmed those judgments.

Petitioners filed a Suggestion of *En Banc* Rehearing, which was denied.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

The decision of the Court of Appeals is in conflict with the decision of this Court in *East River Steamship Corp. v. Transamerica Delaval, Inc.* This Court there held that causes of action in products liability, including negligence and strict liability, exist under the general maritime law, so long as the defective product creates an unreasonable risk of harm to persons or property other than the product itself. In *East River,* charterers of four supertankers proceeded against a turbine manufacturer, seeking recovery in tort for losses caused by alleged defects in the design and manufacture of turbines which had been in-

stalled in the vessels. Malfunctions of component parts of each of the four turbines resulted in damage to other parts of the respective turbines. However, only the turbines were damaged in each instance. No other part of any of the vessels was damaged. The Court held that there was no damage to other property because each supertanker's defectively designed turbine components damaged only the turbines themselves.

In *East River*, this Court carefully refrained from holding that the entire vessel was to be considered "the product." Rather, this Court emphasized that because each turbine was supplied as an "integrated package," each turbine was properly regarded as a "single unit." The recognition by this Court that a vessel is made up of multiple discrete components and systems which perform disparate functions is the linchpin of the *East River* opinion.

However, the Court of Appeals in the cases at bar held that an entire completed vessel is "the product" and, further, that since none of the alleged defects caused injury to "other property," i.e., damages external to the ships themselves, no maritime cause of action in negligence or strict liability was cognizable as to Avondale or as to AEG.

In treating the entire completed tankers as "the product," the decision of the Court of Appeals is plainly in conflict with *East River* and effects a sweeping and unjustified denigration of products liability in the maritime law. Under the decision of the Court of Appeals, unless damage extends beyond the vessel, all shipbuilders and all subcontractors, including those subcontractors furnishing only a "single unit" or "integrated package," would be insulated from tort exposure no matter how egregious their

conduct and irrespective of the nature and extent of damages caused to other components and systems of the vessels.

CONCLUSION

A shipbuilder which provides a defective component or unit of a vessel, or a subcontractor which supplies such a component or unit, as a consequence of which harm is inflicted to unrelated, properly functioning components of the vessel, should not receive absolution from responsibility in negligence or strict liability. The decision of the Court of Appeals is in conflict with *East River* and reaches, as a matter of policy, an unsound result. Were the decision of the Court of Appeals permitted to stand, a shipowner would be deprived ever from asserting a tort claim against a shipbuilder, or against a subcontractor in respect of a single component of the vessel, unless the damage extends beyond the vessel. This result would smother tort principles under a blanket of contract law.

Respectfully submitted,

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January, 1988

OF COUNSEL:

Phelps, Dunbar, Marks, Claverie & Sims

APPENDIX A

SHIPCO 2295, INC., Shipco 2296, Inc., Shipco 2297, Inc., Shipco 2298, Inc., and SPC Shipping, Inc., Paintiffs-Appellants,

v.

AVONDALE SHIPYARDS, INC., and Allgemeine Elektricitats Gasellschaft Telefunken, Defendants-Appellees.

No. 86-3305.

United States Court of Appeals,
Fifth Circuit.

Aug. 28, 1987.

Before POLITZ, JOHNSON and DAVIS, Circuit Judge.

W. EUGENE DAVIS, Circuit Judge:

Appellants challenge the district court's dismissal of their action against Avondale Shipyards, Inc. (Avondale) and Allgemeine Elektricitas Gasellschaft Telefunken (AEG) for damage to appellants' vessels resulting from construction defects. 631 F.Supp. 1123. We affirm.

I.

Standard Oil Company of Ohio (SOHIO) entered into six separate but identical contracts with Avondale for the

construction of six tankers bearing Avondale Hull Nos. 2295-2300. Defects in four of those tankers bearing Hull Nos. 2295-2298 are at issue in this litigation.

In 1977, SOHIO assigned its rights under the construction contracts to a trust. The trustee, as shipowner, entered into separate bareboat charters for each of the vessels. The chartering entities were four Shipco companies, each named according to the tanker hull number they represent; under the bareboat charter the trustee assigned its rights under the construction contracts to each Shipco company. A long term time charter for each of the four vessels was simultaneously executed betwen each Shipco company, as charter-owner, and SPC Shipping, Inc., as time charterer.

Avondale designed, assembled and constructed the vessel hull and all vessel systems relevant to this litigation except the steering system, which was designed by AEG. Avondale purchased the steering system design from AEG, assembled the AEG designed system and incorporated it into the vessels.

SOHIO accepted delivery of the four vessels in question between 1977 and 1978. The warranty periods for each of the four vessels expired on the following dates:

Hull No. 2295 (S/T ATIGUN PASS)—December 11, 1978; Hull No. 2296 (S/T KEYSTONE CANYON)—Feb. 27, 1979; Hull No. 2297 (S/T BROOKS RANGE)—May 12, 1979; and Hull No. 2298 (S/T THOMPSON PASS)—September 8, 1979.

Upon expiration of the warranty period, various repair items remained unresolved. SOHIO and Avondale continued negotiations in an attempt to resolve SOHIO's warranty claims; on December 9 and 10, 1981, an agreement was reached. The agreement between the parties confirmed "full and final settlement of all ASI [Avondale] obligations under the contract for Hulls 2295, 2296, 2297 and 2298" and "final settlement of the construction contracts."

After the settlement was bound, appellants assert that various defects in the vessels came to their attention. On December 11, 1981, a casualty occurred on the S/T ATIGUN PASS. Shipco contends that faulty casting of the propeller caused the propeller blades to break off which in turn damaged the rudder and line shaft assembly. In the spring and summer of 1982, structural fractures in hull members appeared on all four vessels. Shipco alleges that the fractures resulted from Avondale's improper design and construction of brackets which permitted vibrations to radiate from the bracket connection to the hull members. Two of the vessels also experienced damage to their steering systems. Shipco alleges that this damage stemmed from a defectively designed or manufactured cap screw which sheared off damaging the steering gear engine along with pumps and valves in the hydraulic system.

Ship sought recovery of its repair costs from Avondale and AEG under both warranty and tort theories. The time charterer of the vessels, SPC Shipping sought

to recoup from Avondale and AEG on tort and warranty theories the charter hire it was required to pay while the vessels were laid up for repairs.

The district court, ruling on Avondale's motion for summary judgment and AEG's motion for judgment on the pleadings, held that: (1) all of Shipco's warranty claims arising out of the vessel's construction were barred by the 1981 settlement agreement between SOHIO and Avondale; (2) plaintiffs had no maritime tort cause of action as a matter of law; and (3) SPC Shipping's claims as a time charterer are barred by *Robins Drydock & Repair Co. v. Flint,* 275 U.S. 303, 48 S.Ct. 134, 72 L.Ed. 290 (1927) and its progeny. The district court entered judgment in favor of Avondale and AEG and dismissed appellants' suit.

II.

A.

On appeal, Shipco and SPC do not contest the district court's denial of relief to them on a warranty theory. The critical issue, on which this appeal turns, is whether the district court erred in rejecting appellants' claims in tort against Avondale and AEG.

The issue presented by this appeal can be stated as follows: Is Avondale, as the vessel builder and seller, or AEG, as the designer of a component part of the vessels, liable to the appellants in tort under the general maritime

law for damage to the vessels themselves due to vices in their construction? Fortunately, the United States Supreme Court in *East River Steamship Corp. v. Transamerica Delaval, Inc.*, — U.S. —, 106 S.Ct. 2295, 90 L.Ed. 2d 865 (1986), decided most, if not all, the questions presented in this appeal.

In *East River* Seatrain Shipbuilding Corp. (Shipbuilding) contracted to construct four tankers for four separate subsidiaries of the parent company, Seatrain Lines, Inc. (Seatrain). Shipbuilding in turn contracted with respondent, Transamerica Delaval, Inc. (Delaval) to design, manufacture and supervise the installation of turbines in all four vessels. When each vessel was completed its title was transferred from the contracting subsidiary to a trust company which in turn chartered the ship to four separate Seatrain subsidiaries which filed the initial action. Each bareboat charterer assumed responsibility for the cost of repairs to the vessels. Three of the vessels sustained turbine damage in varying degrees resulting from disintegration of the first-stage steam reversing ring. The fourth vessel, the BAY RIDGE, also experienced turbine damage as a result of the improper installation of the astern guardian valve.

As in the instant case, the plaintiffs in *East River* were unable to establish their claims predicated in breach of warranty because of waiver of warranty in the sales instruments and later settlement of the warranty claims. As a result, the Court stated the question to be decided as follows: "In this admiralty case, we must decide whether a cause of action in tort is stated when a defective product purchased in a commercial transaction malfunctions, injuring only the product itself and causing purely ecomonic

loss. *Id.*, at —, 106 S.Ct. at 2296, 90 L.Ed.2d at 869. The Court, after considering the various approaches to this problem adopted by various state and federal courts adopted the majority land-based view "that a manufacturer in a commercial relationship has no duty under a negligence or strict products-liability theory to prevent a product from injuring itself." *Id.* at —, 106 S.Ct. at 2302, 90 L.Ed.2d at 877. The Court reasoned that:

> Damage to a product itself is most naturally understood as a warranty claim. Such damage means simply that the product has not met the customer's expectations, or, in other words, that the customer has received "insufficient product value" . . . . The maintenance of product value and quality is precisely the purpose of express and implied warranties . . . . Therefore, a claim of a non-working product can be brought as a breach-of-warranty action. Or, if the customer prefers, it can reject the product or revoke its acceptance and sue for breach of contract.

Id., at —, 106 S.Ct. at 2303, 90 L.Ed.2d at 877-78.

Because the plaintiffs sought recovery in tort for damage to the product itself, the Court rejected their claims.

The Court, in adopting this view, effectively overruled our own law on the subject articulated in *Jigg, III, Corp. v. Puritan Marine Insurance Underwriters Corp.*, 519 F.2d 171 (5th Cir.1975) in which we held that: "Under the general maritime law a maunfacturer/seller owes a purchaser with whom it is in direct and elaborate contractual relationship regarding a product a free-floating duty not to produce a negligently-constructed or designed product . . . . [T]he manufacturer owes the purchaser (in direct contractual relationship) a duty to produce a product so

negligence-free that it cannot harm itself." *Id.* at 180. The position adopted by the Supreme Court in *East River* is generally consistent with Judge Gee's dissent in *Jigg, III* where he stated:

> I would hold that the general maritime law should not and does not recognize a tort based product-liability cause of action based either on negligence or strict-manufacturer liability when there is privity and when the only loss suffered results from damage to the defective product itself. In holding that it does, we simply withdraw from the parties, and after the fact, a portion of the freedom to contract which the codifiers meant them to keep.

Id. at 181.

B.

Shipco and SPC Shipping argue that the district court erred in dismissing their actions against Avondale because defects in certain components of each vessel caused damages to unrelated components in the same vessel.[1] Appellants argue that the resulting damage represents damage to "other property" and *East River* recognizes a purchaser's right to recover economic losses resulting from damages to the product, in tort, when the defect in the product causes damage to other property.

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1. Appellants contend that faulty casting of the propeller on the ATIGUN PASS caused the propeller blades to break off which in turn damaged the rudder and line shaft assembly. Appellants also argue that defective brackets on all four vessels permitted vibrations and caused stress fractures in hull members. On two of the vessels, appellants allege that defective cap screws in the steering system sheared off and damaged the steering gear engine along with pumps and valves in the steering gear hydraulic system.

In applying the rule adopted by *East River,* that one party to a commercial transaction cannot recover in tort for economic loss that arises from damage to the product itself but may recover for such loss that arises from damage to "other" property, appellants' argument raises the question—what is the product?

In attempting to identify the product, our analysis leads us to ask what is the object of the contract or bargain that governs the right of the parties? The completed vessels were obviously the objects of the contract. Shipco[2] did not bargain separately for individual components of each vessel. We are persuaded that those same vessels that were the object of the contract must be considered "the product" rather than the individual components that make up the vessels.

The underlying reason the Court in *East River* denied a tort cause of action to the purchaser for economic loss resulting from damage to the vessel was because such losses represent "the failure of the purchaser to receive the benefit of its bargain—traditionally the core concern of contract law." — U.S. at —, 106 S.Ct. at 2302, 90 L.Ed. 2d at 876. Acceptance of Shipco's argument that it should have a tort remedy against Avondale would undermine this central objective of *East River* that the parties receive the benefit of their bargain.

---

2. As stated in part I of this opinion, all rights SOHIO acquired in the construction contracts with Avondale were assigned to the relevant Shipco company. Because the Shipco companies as assignees hold the same rights under those contracts as SOHIO, for purposes of this opinion we simply refer to Shipco as the purchaser.

In *East River,* the vessel owner made the same argument in its suit against the turbine supplier, Delaval, that Shipco makes in the instant case. The turbine damage was caused in three of the vessels from the disintegration of a ring. The turbine damage in the fourth vessel resulted from improper installation of a valve. The court rejected the shipowner's argument that the resulting damage to the turbines should be considered damage to "other property": "Since all but the very simplest of machines have component parts, [a contrary] holding would require a finding of 'property damage' in virtually every case where a product damages itself. Such a holding would eliminate the distinction between warranty and strict products liability.' " *East River,* at —, 106 S.Ct. at 2300, 90 L.Ed.2d at 874.

Shipco cites no authority in support of its position that a defect in one component of the item sold that causes damage to unrelated components of that item constitutes damage to "other property"; and our own research has uncovered no authority to support this argument. A number of jurisdictions, however, have rejected Shipco's argument. *James v. Bell Helicopter Co.,* 715 F.2d 166 (5th Cir.1983) (applying Texas law); *Flintkote Co. v. Dravo Corp.,* 678 F.2d 942 (11th Cir.1982) (applying Georgia law); *Air Lift International, Inc. v. McDonnell Douglas Corp.,* 685 F.2d 267 (9th Cir.1982) (applying California law); *Scandinavian Airlines System v. United Aircraft Corp.,* 601 F.2d 425 (9th Cir. 1979) (applying California law); *Mid-Continent Aircraft Corp. v. Curry County Spraying Service, Inc.,* 572 S.W.2d 308 (Tex.1978); *Tri-State Ins. Co. v. Lindsay Brothers Co.,* 364 N.W.2d 894 (Minn.App.1985); *Cedars of Lebanon Corp. v. European*

X-Ray Distributors, Inc., 444 So.2d 1068 (Fla.App.1984); *Henderson v. General Motors Corp.*, 152 Ga.App. 63, 262 S.E.2d 238 (1979); *Long v. Jim Letts Oldsmobile, Inc.*, 135 Ga.App. 293, 217 S.E.2d 602 (1975).

We conclude therefore that the district court correctly dismissed this action against Avondale. Avondale sold the completed vessels to Shipco. The damage sought by appellants—repair costs and loss of profits—are the same type damage the Court in East River characterized as economic losses. *East River* teaches that such economic loss for damage to the product bargained for, the vessels in this case, cannot be recovered in tort.

C.

The argument of Shipco and SPC Shipping that they are entitled to a tort recovery against AEG is also predicated on the "other property" exception recognized by *East River*.

Shipco alleged that Avondale purchased the design of the hydraulic steering system from AEG; Avondale then fabricated and installed the AEG designed system in the vessels. Shipco asserts that a capscrew in the steering system sheared off and caused extensive damage to the steering gear engine, the pump in the steering gear hydraulic power units and the valves in the steering gear hydraulic system. Shipco contends that we must assume that the steering gear engine, pumps and valves are independent of the system designed by AEG and the damage to that equipment is damage to "other property."

Because we cannot determine from the pleadings in this case whether the steering gear engine or the hydraulic

pumps and valves are within the scope of the system designed by AEG, we assume for purposes of this opinion that they are not.

In considering Avondale's liability to appellants, we rejected Shipco's contention that damage sustained to one component of the vessel caused by a defect in a different component of the vessel represented damage to "other property." We reasoned that as to Avondale, which assembled the entire vessel, the "product" was the finished vessel rather than the components of the vessel. Shipco's argument against AEG requires that we consider whether we should reach a different result as to AEG because its contribution to the vessels was limited to a single component, the steering system.

We see no rational reason to give the buyer greater rights to recover economic losses for a defect in the product because the component is designed, constructed or furnished by someone other than the final manufacturer. The buyer ordinarily has no interest in how or where the manufacturer obtains individual components; the buyer is usually interested in the quality of the finished product and is content to let the manufacturer decide whether to do all the work or delegate part of it to others.

We are persuaded that the reasons given above for our conclusion that, as to Avondale, the finished vessel is the product, support a similar conclusion as to AEG. The critical fact that Shipco bargained for a finished vessel remains unchanged. Acceptance of Shipco's argument that it can assert a tort claim against AEG would undermine the objective of *East River* that the parties receive the benefit of their bargain. This is particularly true in this

case where Shipco bargained with Avondale for the warranty the subcontractors and component suppliers would furnish.[3]

Permitting a buyer to assert a tort claim against a subcontractor or component supplier may also implicate the seller; the supplier or subcontractor who is sued in tort can be expected to assert indemnity or contribution claims against the seller which assembled the product and incorporated the supplier's component or work in the finished product. The effect of such a claim, if successful, would visit ultimate tort liability for defects in the vessel on the manufacturer and seller and would nullify the objective of *East River* to limit the seller's liability in this type case to that assumed by contract.

Several cases decided by the Eighth and Ninth Circuits under Minnesota and California law support the view that the product in this context means the finished product bargained for by the buyer rather than components furnished by a supplier. *American Home Assurance Co. v. Major Tool & Machine, Inc.*, 767 F.2d 446 (8th Cir.1985) (the court relied on the following decision by the Minnesota courts: *Minnesota Society of Fine Arts v. Parker-Klein*, 354 N.W.2d 816 (Minn.1984); *St. Paul Fire & Ma-*

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3. The pertinent portion of the agreement between SOHIO and Avondale provides:

> The provisions set forth herein as to the liability of the Builder hereunder are to apply also to each and every item of material and workmanship furnished by subcontractors or vendors in Builder's performance of this Contract. Builder also assigns to Purchaser any warranties or rights that it may have with respect to its subcontractors and suppliers and shall assist Purchaser in securing performance thereunder.

rine Insurance v. Steeple Jac, 352 N.W.2d 107 (Minn. App. 1984); *Tri-State Ins. Co. v. Lindsay Brothers Co.,* 364 N.W.2d 894 (Minn.App.1985); *Scandinavian Airlines System v. United Aircraft Corp.,* 601 F.2d 425 (9th Cir.1979); *Air Lift International, Inc. v. McDonnell Douglas, Corp.,* 685 F.2d 267 (9th Cir.1982); *Aeronaves de Mexico v. McDonnell Douglas Corp.,* 677 F.2d 771 (9th Cir.1982).

At least one court has held to the contrary. *See Mike Bajalia, Inc. v. Amos Construction Co.,* 142 Ga.App. 225, 235 S.E.2d 664, 665 (1977).

For reasons stated above, we are persuaded that the view expressed by the Eighth and Ninth Circuits, applying Minnesota and California law, is more compatible with the teaching of *East River* and we adopt that view. We therefore conclude that the district court correctly dismissed Shipco and SPC Shipping's action against AEG.[4]

III.

Because the district court correctly dismissed appellants' action, its judgment is AFFIRMED.

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4. The appellants assert several additional arguments: (1) the district court failed to give them adequate notice and an opportunity to present evidence on the extent of the damage to the vessels; (2) the disclaimers in the construction contract do not preclude a maritime tort action; (3) appellants did not release appellees from tort liability in the settlement agreement; and (4) SPC Shipping has a proprietary interest in the four vessels and its assertion of that action against Avondale is not incompatible with *Robins.* Our conclusion that appellants may not assert a maritime tort action in this case to recover for economic loss to the purchased vessels makes consideration of these arguments unnecessary.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 86-3305

SHIPCO 2295, INC., ET AL.,

Plaintiffs-Appellants,

versus

AVONDALE SHIPYARDS, INC.,
ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana

ON SUGGESTION FOR REHEARING EN BANC
(Opinion August 28, 5 Cir., 1987, — F.2d —)

(October 29, 1987)

Before POLITZ, JOHNSON and DAVIS, Circuit Judges.
PER CURIAM:

(✓) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

( ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ W. Eugene Davis

United States Circuit Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 86-3305

D.C. Docket No. CA-82-5650 c/w 83-2494 and 84-4361

SHIPCO 2295, INC., ET AL.,

Plaintiffs-Appellants,

versus

AVONDALE SHIPYARDS, INC., ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana

Before POLITZ, JOHNSON, and DAVIS, Circuit Judges.

JUDGMENT

(Filed August 28, 1987)

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

IT IS FURTHERED ORDERED that plaintiffs-appellants pay to defendants-appellees the costs on appeal, to be taxed by the Clerk of this Court.

August 28, 1987

ISSUED AS MANDATE: NOV 9 1987

APPENDIX D

MINUTE ENTRY
March 20, 1986
SCHWARTZ, J.

SHIPCO 2295, INC., ET AL.	CIVIL ACTION
VS.	NO. 83-2494
AVONDALE SHIPYARDS, INC. ,	c/w 82-5650, 84-4361
	SECTION "A"

(Filed March 20, 1986)

This matter is before the Court upon motion to amend findings of fact filed by plaintiffs and intervenor herein. There being no objection to the changes requested in item 1 of the motion, IT IS ORDERED that the Court's Opinion of February 24, 1986 be and the same is hereby amended to read as set forth in the attached Amended Opinion.

The amendment requested in item 2 has no bearing upon the Opinion. However, the record shall hereby reflect that the Court limited discovery to the matters raised in the bifurcated trial to avoid the parties' incurring needless litigation expenses.

As to the amendments sought in item 3 of the motion, defendant Avondale has raised opposition, in which defendant AEG Telefunken joins. However, the Court has amended its prior opinion to read as requested by movants in item 3, the Court having determined that the requested amendments are not material to the outcome of the case. However, the Court has made certain additional changes, reflected in footnotes 13 and 13a, page 16, of the Amended Opinion.

CC: ALL COUNSEL OF RECORD

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

SHIPCO 2295 INC., ET AL.,	CIVIL ACTION
VERSUS	NO. 83-2494
AVONDALE SHIPYARDS, INC.	SECTION "A"

CONSOLIDATED WITH

SHIPCO 2295 INC., ET AL.,	CIVIL ACTION
VERSUS	NO. 82-5650
AVONDALE SHIPYARDS, INC.	SECTION "A"

CONSOLIDATED WITH

SHIPCO 2295 INC., ET AL	CIVIL ACTION
VERSUS	NO. 84-4361
AVONDALE SHIPYARDS, INC., ET AL	SECTION "A"

AMENDED OPINION

(Filed March 25, 1986)

SCHWARTZ, J.

This matter came before the Court on December 5 and 6, 1985, for summary non-jury trial and hearing on the motion of defendant AEG Telefunken for judgment on the pleadings. Having considered the testimony of the witnesses, the exhibits introduced at trial and the legal contentions of the parties, the Court rules as follows. To the extent any of the following findings of fact constitute conclusions of law, they are adopted as conclusions of law; to the extent any of the conclusions of law stated below constitute findings of fact, they are so adopted.

Introduction

These consolidated cases arise out of certain vessel construction contracts between defendant Avondale Shipyards, Inc. and Standard Oil Company (Ohio) [hereinafter "Sohio"]. At issue in Civil Action No. 83-2494 are certain hull stress fractures appearing in four vessels built by Avondale for Sohio, at issue in Civil Action No. 82-5650 is a propeller casualty sustained by one of the vessels (M/V ATIGUN PASS, Hull 2295); at issue in Civil Action No. 84-4361 are certain steering mechanism failures experienced by the four vessels.

The issues forming the subject of this opinion were originally brought before the Court by Avondale upon motion for summary judgment in connection with the three consolidated cases. Avondale there sought determinations that all claims with respect to the alleged vessel defects had been settled, that plaintiffs have no contractual causes of action against Avondale; that plaintiffs have no tort causes of action against Avondale as a matter of law; and that plaintiffs have no right of action in either contract or tort against Avondale. On June 20, 1985, the Court denied Avondale's motion for summary judgment by minute entry without a formal hearing, but to facilitate resolution of the issues implicit in the motion, the Court bifurcated two questions for trial:

A. Whether the original contracts were modified by certain warranties alleged to have been made by Avondale on August 17-18, 1976, and

B. The effect of an alleged compromise and/or accord and satisfaction of December 1981 upon any claim found to exist in light of the first stated matter to be tried.

Thereafter, AEG Telefunken, designer of the steering mechanism and named defendant in Civil Action No. 84-4361, joined the fray by filing a motion for judgment on the pleadings, which the Court set for hearing in conjunction with the bifurcated trial.

Pursuant to the minute entry, the parties submitted various stipulations, statements of fact, deposition testimony and exhibits. The issues were also extensively briefed. The matter proceeded to trial before the Court sitting without a jury on December 5 and 6, 1985, at which time the Court heard the testimony of Avondale representatives Richard Brunner, Darold Poulin, and Rene J. Meric, Jr.; and Sohio's Richard Whiteside.

The parties also submitted to the Court designated deposition testimony of Michael Harbottle, Ian Telfer, John Rutter, John Clinton, Daniel Melitz, and David Webb, all naval architects with BP Shipping Limited ["BP"], a subsidiary of British Petroleum Co. BP acted as Sohio's contract representative during vessel construction. Also submitted was the deposition testimony of James Cross, Purchasing Manager at Sohio from 1972 to 1977, chief Sohio negotiator of the Sohio-Avondale construction contracts in 1974 and negotiator of a BP-Sohio "Supervisory Agreement" dated July 1, 1975.

Although Avondale's motion for summary judgment was filed in connection with all three consolidated matters, the alleged warranty modifications affect only the claims for structural failures experienced by the Shipco vessels and do not involve any claims made in Civil Action No. 82-5650 or Civil Action No. 84-4361. The alleged compromise

and/or accord and satisfaction was, however, raised as a defense to all claims of purported vessel defects and has accordingly been so considered by the Court. The Court has also reconsidered all arguments raised in Avondale's original motion for summary judgment and plaintiffs' responses.

For the reasons set forth below, the Court determines there was no modification of the construction contract warranties[1] so as to afford plaintiffs a cause of action for breach of warranty due to the appearance of the stress fractures, and in any event, all claims arising out of the vessel construction were settled as a result of the Sohio-Avondale negotiations in 1981. Moreover, plaintiffs have no maritime tort causes of action against Avondale and AEG Telefunken as a matter of law, and the claims of SPC Shipping as time charterer are barred by *Robins Drydock* and its progeny. Accordingly, the Court rules in favor of Avondale on the warranty questions and dismisses plaintiffs' claims in light of the bifurcated trial. As to any remaining claims, Avondale's motion for summary judgment is well founded. The Court further grants the motion of AEG Telefunken for judgment on the pleadings.

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[1] Plaintiffs admitted they have no causes of action for breach of contract or for breach of express or implied warranties arising out of the construction contracts: "Plaintiffs no longer allege that they have causes of action in these suits for breach of contract or of express or implied warranties arising out of the Construction Contracts . . . ." Rather, plaintiffs claim these contracts and warranties were superseded by Avondale's representations in August 1976 to BP. See Memorandum in Opposition to Motion for Summary Judgment, p. 31, Document No. 39.

Findings of Fact

The Court will first discuss its findings based upon the parties' stipulations. Thereafter, the Court will address the trial testimony and depositions, in light of the documentary evidence.

The corporate status of the parties is stipulated. On December 30, 1974 Sohio entered into six separate but identical contracts with Avondale for the construction of six tankers bearing Avondale Hull Numbers 2295-2300. Defects regarding Hulls 2295-98 are at issue in this litigation.

Prior to negotiating the Sohio-Avondale contracts, Sohio obtained technical assistance from naval architects and marine engineers at BP,[2] relying upon BP's experience in operating a tanker fleet. It is stipulated that BP was not involved in the execution or signing of the Sohio-Avondale contracts, which reflect the signatures of Mr. M. Lee Rice, Chairman of the Board of Avondale, and Mr. Frank Mosier, Vice-President, Supply and Distribution for Sohio. Following execution of the contracts, BP was designated as Sohio's contract representative pursuant to Article 5 of the Sohio-Avondale contracts and a "Supervisory Agreement" between BP and Sohio dated July 1, 1975. See Joint Exhibit 3; Joint Exhibit 6 (signed by Mr. Cross on behalf of Sohio; signature on behalf of BP illegible). Accordingly, BP provided technical advice to

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[2] By 1978, BP acquired 52% of Sohio common shares. See Plaintiffs' Memorandum in Opposition to Motion for Summary Judgment, Statement of Disputed Material Facts, p. 2 (attached to Document No. 39 in the record).

Sohio during its contract negotiations with Avondale and further represented Sohio in ongoing meetings and negotiations with Avondale during the course of construction. BP also reviewed and approved each of the many Avondale design and construction drawings on Sohio's behalf. See Joint Stipulations of Undisputed Facts, Document No. 55 [hereinafter "Stipulation"], Nos. 21-23.

Avondale and BP communicated modifications and approvals to Avondale's construction drawings by telex, letter and/or by conference. The many conferences resolving such matters were held either at Avondale's offices in Louisiana or at BP's office in London. BP prepared and distributed conference notes or minutes of the London meetings; Avondale prepared and distributed conference notes of the Louisiana meetings. Generally, Sohio was not sent copies of these notes. See Stipulation No. 29.

The Sohio-Avondale contracts contained certain builder's warranty provisions in Article 9[3] of the contracts.[4]

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[3] This warranty provides in pertinent part:

(a) *General*

Builder warrants that the vessel when sold and delivered to Purchaser [Sohio] shall conform to the Contract Plans and Specifications and to the undertakings otherwise contained in this Contract and shall be seaworthy, tight, staunch, strong and in every way ready to receive and transport cargo and suitable for use in the carriage of crude petroleum. In the event any defects in the design, original materials or workmanship in the vessel . . . other than those defects which are due to wear and tear or misuse by or negligence of Purchaser or its employees or agents, are discovered within 12 months after delivery of the Vessel to Purchaser or after [the date the vessel is deemed

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Section (d) of Article 9, entitled "Limitations on Builder's Warranty," provides in pertinent part:

> The warranties, guaranties and remedies set forth in this Article 9 are in substitution of *any and all other* warranties, guaranties and *remedies* expressed or which might be implied (including but not limited to any implied warranties of merchantibility, fitness for a particular purpose and workmanlike services) with respect to the construction, delivery and sale of the Vessel; and Builder shall, following said delivery and sale, *in no event* be liable to Purchaser for the breach of *any* warranty, guarantee, or *remedy,* expressed or implied, in fact or in law, except as specifically hereinbefore set forth. *In no event,* shall Builder be liable to Purchaser for consequential damages as a result of any such breach. Builder's total liability on account of liquidated damages for Performance Deficiencies and delayed delivery and on account of correction of Warranty Deficiencies shall not exceed $3,500,000.

Joint Exhibit 3, pp. 41-42 (emphasis added.)

The contracts merge all prior negotiations into the contract documents and state that no changes, amendments

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> ready for delivery], any such defect (a "Warranty Deficiency") and any immediate damage to the Vessel resulting directly therefrom shall be corrected by Builder, provided that Purchaser shall have notified Builder of such defect within 30 days after discovery thereof . . . .

Joint Exhibit 3, p. 38.

[4] There is a separate Sohio-Avondale contract for each of the tankers in question. However, the language of each contract is identical, and by stipulation, the construction contract for Hull 2295 is designated the contract for all four vessels.

or modifications shall be valid unless reduced to writing and signed by the parties. Joint Exhibit 3, Article 22(a), p. 62. The term "parties" is defined in Schedule 1, "Definitions": "'Parties' means Builder and Purchaser." Joint Exhibit 3, p. iii. Specific procedures for change orders and conflicts between contract plans and specifications are addressed in Article 1(b) and Article 8(b). Article 1 further provides for specifications to prevail over contract plans, but the contract is to prevail over both contract plans and specifications. Article 8 provides that all change orders incorporated into the contract work shall be the subject of specific written agreement between the parties.

During construction of the Sohio vessels by Avondale, BP discovered certain structural defects in vessels in the BP fleet, specifically in its "BRITISH EXPLORER" class vessels. This discovery led BP to review the Sohio tankers' design and construction to evaluate possible similarities in the BP and Sohio vessels. BP's concern that the Sohio vessels might experience similar structural defects was also communicated to Avondale, both by telex[5] and

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[5] The telex was from John Rutter, naval architect in charge of BP's Design and Construction Branch, to Avondale's Mr. Mabson. Contract communications, no matter what their content, were "channeled through" to Avondale through Mr. Mabson. See Harbottle Deposition, pp. 24-25. The telex provides in pertinent part:

> We have just experienced a major wave induced fatigue structural failure on a series of our [very large crude carriers] [emanating] from the end of butt welds to the edge of longitudinals having fillet welded face bars below the webb. . . . Your ship employs similar

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during meetings in June 1976 involving Mike Harbottle of BP, Avondale Project Manager Al Mabson and Darold Poulin, an engineer heading Avondale's Hull Section.

At meetings on August 17-18, 1976, these problems were further discussed, along with two other subjects, propeller design and thermal stresses. See Stipulation No. 41. Attending these meetings were Mr. Poulin; M. Parker, an Avondale naval architect; Ian Telfer, chief naval architect at BP; John Clinton, a naval architect in BP's Special Projects Group, and Mr. Harbottle. See Joint Exhibit 8. Sohio did not participate directly in the meetings, although the Court finds it participated through BP as its designated contract representative.

The usual conference notes were prepared by BP's Mr. Harbottle and forwarded to Mr. Mabson. The notes reflect discussion of BP's concern with the Avondale representatives and state in pertinent part:

> ASI then presented their own findings which, in their opinion, indicated that similar fractures would not occur on their vessels being built in New Orleans. After further discussions, *it was agreed* that the Avon-

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> long'ls and vert side frames. Lloyds confirm our experience that lap welded connections of F.B.'s and bkts to such frames have not resulted in failures. Your ship in the main employs lap welded [connections]. However, we must insist that where butt welds are currently shown, . . . the detail will have to be changed. P1 study structure throughout ship and send revised details for approval wherever butt welding currently shown. . . . We emphasize this is major importance item.

See Plaintiffs' Exhibit 3.

dale ships would be modified as indicated in the attached sketches and notes.

See Joint Exhibit 8 (emphasis added). No change orders or other memorialization of agreement were executed in respect of matters discussed during the August 17-18 meetings. See Stipulation No. 44.

In 1977, Sohio assigned its rights under the contracts to a trust, with Avondale approval. The trustee, as designated shipowner, entered into separate bareboat charters for each of the vessels in question in this litigation. The chartering entities were four Shipco Companies, each named according to the tanker under charter. A long term time charter for each of the four vessels was simultaneously executed between each Shipco Company as chartered owner and SPC Shipping Inc. as time charterer. See Stipulation Nos. 18-20.

Sohio accepted delivery of the four vessels in question in 1977 and 1978. Thereafter, guaranty repair claims in respect of the vessels were submitted to Avondale pursuant to Article 9(a) of the contracts, and Avondale accepted responsibility for many of these claims. See Stipulation No. 47.

Sohio ultimately acknowledged expiration of warranty periods for each of the four vessels on the following dates:

ST ATIGUN PASS—December 11, 1978;

ST KEYSTONE CANYON—February 27, 1979;

ST BROOKS RANGE—May 12, 1979; and

ST THOMPSON PASS—September 8, 1979.

See Stipulation No. 49. Upon expiration of the above guaranty periods, various repair items remained unre-

solved, and by letter of November 20, 1979, Avondale sought resolution of the disputed warranty invoices and release of $1,225,536.48 from the contract hold back fund held by Sohio under Article 2 of the contracts to ensure completion by Avondale. See Joint Exhibit 9; Stipulation No. 52. By contrast, Sohio claimed it was entitled to retain the fund and to recover an additional $40,000 from Avondale. Stipulation No. 53.[6]

Negotiations between Sohio and Avondale thereupon commenced, see Joint Exhibit 10, and continued through 1980 and 1981, between Richard Whiteside, Sohio's Manager of Marine Engineering, and Paul Wagner and Rene Meric, Avondale's Vice-President of Contract Administration. As confirmed through an exchange of telexes between Sohio and Avondale, an agreement was reached as to outstanding claims on December 9 and 10, 1981. See Joint Exhibits 15 and 16; Stipulation No. 56. The telexes further confirm "full and final settlement of all ASI [Avondale] obligations under the contract for Hulls 2295, 2296, 2297 and 2298" and "final settlement of the construction contracts."

On December 11, 1981, an alleged propeller casualty occurred on the ATIGUN PASS. In spring and summer 1982, structural fractures were discovered on all four vessels. In May 1982, Sohio's Mr. Whiteside reported the structural fractures to Avondale. Thereafter, under cover

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[6] The parties appear unable to agree as to the extent to which the, disagreed. Thus, from Joint Exhibit 9, the Court has estimated the total fund then held by Sohio to approximate $3,130,000; the parties were therefore about $4,400,000 apart in their claims.

of a letter dated May 17, 1982, Mr. Meric sent Mr. Whiteside a copy of the minutes of the August 17-18, 1976 meetings. This was Sohio's first actual knowledge of those minutes. See Stipulation No. 45.[7]

Against these background stipulations, the Court heard testimony regarding the course of dealings between the parties and the particular matters discussed at the August 17-18, 1976 meetings. The Court also heard testimony of the circumstances surrounding the telex exchange of December 9-10, 1981, and the settlement of outstanding contract claims.

The Court first heard the testimony of Mr. Brunner, Avondale's Executive Vice-President of Contract Procedures. Mr. Brunner's testimony shows the parties understood and abided by the methods of contract modification through written contract amendment and change order procedures. Mr. Brunner testified, in connection with Defendant Exhibits 18-22 and 29,[8] that contract amendments

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[7] Following the ATIGUN PASS casualty, an Avondale representative participated in a survey of the propeller damages at Sohio's request and did not bill Sohio for this trip. Mr. Meric also forwarded to Sohio suggested modifications for the vessels to ameliorate the failures reported in May 1982. Plaintiffs contend these actions by Avondale are tacit admissions of continuing warranty obligations surviving the December 9-10, 1981 settlement. However, the general context of the actions suggests Avondale was merely investigating the cause behind a potential claim. The Court would not characterize Avondale's actions as mere courtesies, but neither would Sohio's reports of the problems constitute mere courtesies. Practicality would dictate investigation into such complaints.

[8] The Court overruled plaintiffs' objections to the relevancy of Defendant Exhibits 16-23. The exhibits demonstrate contract procedure and assist the Court in determining whether there was any contract change or warranty issuing from the August 17-18, 1976 meetings.

were written and generally signed by the witness and a Sohio representative.[9] The exhibits further demonstrate this procedure and the level of Avondale's participating corporate representatives. See Joint Exhibits 31-36. The Court therefore finds general change order procedures called for the customer to request a change order, whereupon a price would be submitted and negotiated, and when agreed, the change order would be signed by Sohio and Avondale representatives.[10] In this regard, BP signed a number of change orders on behalf of Sohio, see Plaintiffs' Exhibit 1, and the Court finds that BP had authority to so represent Sohio in light of the BP-Sohio Supervisory Agreement and ongoing business procedures and dealings demonstrated by the exhibits and testimony in this case. But, on Avondale's part, the testimony and exhibits show consistent involvement of Avondale officers in the change order procedures. This distinction is important as the obligations here at issue are sought to be enforced against Avondale.

Mr. Brunner also testified to innumerable meetings between Avondale and BP to develop working drawings from the plans and specifications for daily construction

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[9] The amendment reflected in Exhibit 18 was signed by Avondale Chairman of the Board, Mr. Rice, and by Sohio Vice-President, Mr. Mosier, together with attesting witnesses. Defendant Exhibits 19-22 were signed by Mr. Brunner and by Sohio's Purchasing Manager, Mr. Cross.

[10] The change order quotations were signed by Mr. Brunner in offer form, and a signed acknowledgment of such quotes or offers was oftentimes executed by Ian Telfer, BP's chief naval architect, with further written acceptance forwarded to Al Mabson at Avondale.

of the vessels. The Court finds that such conferences were intended to iron out difficulties in construction, and if the contract was not specific, to discuss how a particular problem should be handled. Thus, conferences determined how to proceed to achieve previously specified work. If any changes in vessel design or construction were sought, a written change order would result. By contrast, any conference notes emanating from such meetings were in effect informal memoranda, not having any particular effect on the rights and obligations under the contracts, not in any particular form and not ordinarily intended to supplant the contract or any change orders.

Mr. Brunner's testimony and the documents in evidence show that contract formalities were not observed in every instance. See Joint Exhibits 26, 27 and 30. In particular, plaintiffs stress a prior modification of contract terms granting Sohio an extension of time in, inter alia, making certain payments, which contract modification was signed by neither Sohio nor BP. See Joint Exhibit 27. Thus, plaintiffs urge the Court to accept the August 1976 conference notes drafted by BP, Joint Exhibit 8, as a similar informal contract modification. The Court rejects this contention: The extension and other documents were signed by Avondale, against whom the contract modification would be enforced. The conference notes in question were not signed by an Avondale representative. Thus, the Court concludes a failure to observe formalities on one particular occasion does not sanction a modification of warranties of the magnitude here at issue through the drafting of conference notes alone.

Plaintiffs further contend that Avondale's failure to object to the conference notes is an acceptance of the obli-

gations ensuing from the purported superseding or modified warranties. However, the course of dealings between the parties does not reveal that the recipient of the notes, Mr. Mabson, could have bound Avondale to such obligations by his failure to object to a non-conforming writing. This is particularly true where the notes emanate from meetings attended by Avondale representatives, who, as Mr. Brunner testified, were not delegated any specific authority to alter contract terms during the meetings. To find such a tacit undertaking would stretch the clear mandate of the contracts beyond recognition.

Plaintiffs also stress BP's authority to elicit warranty representations from Avondale and negotiate on Sohio's behalf, in support of their assertion that a modified warranty was given. Assuming pro arguendo BP had such authority, BP's authority would not establish the authority of the Avondale representatives to bind Avondale to such an agreement. This absence of authority strongly militates against a finding that the August meetings resulted in an agreement, either oral or written, to modify existing warranties or undertake new obligations.

Moreover, it is a well accepted business principle that the extent of contractual warranties are figured in the contract cost. Provisions in a contract that it may not be changed, modified or amended except in writing, signed by the parties, are designed to obviate claims that the contract has been restructured without bargained for consideration. Plaintiffs' suggestion that Avondale would extend the limited warranties contained in the contract to encompass what plaintiffs claim in these proceedings defies imagination. There was no evidence offered to show

that the purported warranty modification occurring in August 1976 had any effect on the amounts to be paid to Avondale under the contract. The absence of such evidence confirms the lack of consideration for superseding the contract warranties.

The Court also heard the testimony of Rene Meric, Avondale's Group Vice-President of Contract Administration, tending to support the proposition that the conference notes in question do not rise to the status of a warranty extension, as typified by Defendant Exhibits 1-6.[11] The Court does not find Mr. Meric's brief testimony conclusive on the question whether the warranties were modified in the August 1976 meetings, but the Court does find the usual procedures for warranty extensions were not followed with regard to the purported warranty modification.

Avondale also offered the trial testimony of Mr. Poulin, head of Avondale's Hull Section. Mr. Poulin's testimony demonstrates Avondale's knowledge of potential structural problems derived from problems encountered on the BRITISH EXPLORER class vessels, to which Mr. Poulin referred as the Japanese vessels.[12] Mr. Poulin procured from BP drawings of the Japanese vessels and studied the drawings using ABS standards. However, Mr.

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[11] The Court overruled plaintiffs' objections to the relevancy of Defendant Exhibits 1-6, because those exhibits demonstrate the manner in which warranties were extended under the contract.

[12] More specifically, Poulin had heard of problems with butt welded connections on the Japanese vessels, and there were 214 butt welded connections on the Avondale vessels.

Poulin opined there were three crucial differences between the Japanese vessels and the Sohio vessels. (1) The Sohio vessels had predominantly lap welded connections; (2) the Sohio vessels complied with ABS regulatory standards, whereas the Japanese vessels did not; and (3) the Sohio vessels were built of higher strength and grade steel.

Avondale also urged Mr. Poulin's testimony to show BP's reliance upon Lloyd's, rather than Avondale, for studies regarding possible cracking problems. The Court deems the content of the Lloyd's studies irrelevant, but accepted the testimony for the limited purpose of showing BP had input from Lloyd's regarding potential cracking problems on the Japanese vessels[13]. Thus, the Court permitted Mr. Poulin's testimony as to the calculations performed.

The deposition testimony of Michael Harbottle, Ian Telfer, and John Rutter was submitted by plaintiffs to contradict Mr. Poulin's testimony and to establish that Avondale made a specific oral warranty against the occurrence of stress fractures.[13a] Mr. Rutter testified to his

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[13] The evidence is conflicting whether Lloyd's studied only the Japanese vessel or whether Lloyd's studied both the Japanese and the Sohio vessels. For purposes of this Opinion, it is not material whether Lloyd's studied the Sohio vessels. It suffices for present purposes that Lloyd's studied the BP vessels, as this factor alone demonstrates the availability of technical knowledge to BP and thus Sohio from a reliable source independent of Avondale.

[13a] The Court has painstakingly reviewed the depositions of the BP witnesses and has set forth in Appendix A to this opinion the pertinent portions of testimony, from which given the benefit of every favorable inference, plaintiffs might argue that a modified warranty arose.

conversations with Mr. Poulin, which satisfied Mr. Rutter that Avondale was aware of the structural failures sustained by the BRITISH EXPLORER class vessels, fully understood BP's concern and was conducting independent studies into the problem of structural failures due to stress. Rutter Deposition, pp. 40-42, 44-45, 79, 82-83. Mr. Telfer and Mr. Harbottle testified to events prior to and during the August 1976 meetings.

The record shows BP's confidence that Avondale was taking necessary precautions to avoid the problems experienced by BP's BRITISH EXPLORER class vessels. However, even if BP's confidence arose solely from Avondale's representations, the Court finds the assurances generating BP's confidence did not constitute an agreement to modify then existing warranties, nor do they constitute a new agreement relating to the stress fractures alone.

The testimony convinces the Court that as a fully informed entity with bargaining power equal to Avondale's, BP dismissed as unnecessary formal contact negotiations and amendments and determined no specific warranty would be necessary. The evidence does not show an agreement to amend or modify the contract, but rather an agreement "to certain proposals [BP] put forward to grind the edges of flame-cut material in the problem areas prior to welding;" "to actually replace material in [certain areas of the vessels]; and which changes were represented by sketches attached to the minutes "to display simply the agreements that were reached during the discussions." See Harbottle Deposition pp. 57, 58 & 63.

First, BP's Mr. Harbottle admitted that the overall effect of the actions Avondale agreed to take as a result of

BP's concern were "minimal."[14] See Harbottle Deposition p. 59, line 16. This confirms Mr. Poulin's testimony that discussion of the stress fracture problems occupied only two to three hours on the second day and two to three hours on the third day. Mr. Harbottle also admitted that he personally insured that Avondale effected measures to mitigate this problem. See Harbottle Deposition p. 65.[15] Moreover, BP assumed responsibility for the decision not to contact Sohio with regard to the potential structural failures, (see Harbottle Deposition p. 56), even though the problem was sufficient to move BP to bring in Lloyd's to conduct a study of the BP vessels. See *id.* at p. 45.[16] This testimony is at odds with deposition testimony of the BP representatives replete with BP's awareness of the "major importance" of the structural failure problem. See Plaintiffs' Exhibit 3; Harbottle Deposition p. 34. Nevertheless, given BP's admitted expertise[17] and resultant awareness

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[14] This testimony also supports a finding that any independent oral agreement resulting from the meeting lacked consideration.

[15] The Court finds it unnecessary to determine whether the modifications were, in fact, made and whether Avondale's findings or representations were reasonable. The Court is here concerned only with facts tending to establish whether a specific warranty was made and whether there was a settlement of any remaining claims.

[16] The Court would not be inclined to excuse Avondale from a breach of warranty, if there were one, solely because BP obtained technical advice from a source other than Avondale. However, it is abundantly clear BP had the technical expertise and resources to appreciate the severity of the problem and to communicate BP's concerns to Sohio.

[17] The qualifications and experience of the BP representatives is amply demonstrated by their deposition testimony. See, e.g., Harbottle Deposition pp. 8-13; Rutter Deposition pp. 8-15; Telfer Deposition pp. 9-12.

of the problem, BP's agreed resolution to the problem with relatively minor technical alterations and the absence of Sohio's direct involvement are risks borne solely by BP. Moreover, BP's knowledge and actions are fully chargeable to Sohio, in light of BP's status as Sohio's contract representative. Similarly, BP's failure to obtain written assurances from Avondale and/or other written contract modification is fully chargeable to Sohio and thus to plaintiffs.

In a similar vein, BP's representatives showed an understanding of their role to insure that the tankers were suitable for their intended service.[18] See, e.g., Rutter Deposition p. 15. BP was by no means an unsophisticated concern unaware of the seriousness of the problems encountered in vessel construction and the expense of their consequences.

BP was also well aware that the structural failures occurring on the BRITISH EXPLORER class vessels occurred five to six years after construction. See, e.g., Har-

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[18] Additional deposition testimony was submitted by plaintiffs for the purpose of showing certain stresses in the vessels exceeding the levels recommended by Lloyd's Register of Shipping. The relevance of such testimony is uncertain, in light of the stipulation that ABS was the classification society for the vessels in question. Moreover, any variance with Lloyd's recommendations is irrelevant to the extent it is submitted to show the vessels were not fit for their intended purposes. The issue before this Court is whether the contractual warranties were specifically modified, renewed or superseded as a result of the August meetings, not whether a breach of such warranties occurred.

bottle Deposition p. 28.[19] It is accordingly unfortunate that BP did not advise Sohio representatives conversant with the terms of the Sohio-Avondale contracts of potential problems arising after the expiration of the warranty period. However, as stated above, the Avondale witnesses establish to this Court's satisfaction that the parties had a working knowledge of the negotiation of warranty extensions and change orders and that BP most certainly had the sophistication to require a memorialization of Avondale's representations in compliance with formal contract procedure.

In sum, the meetings, conversations and conference notes upon which plaintiffs rely to support their claims were among non-executive employees, charged with the duty to assure that the vessels were constructed in accordance with specifications and who had authority to agree upon changes in drawings. As far as the Sohio interests were concerned, the individuals involved were technical consultants, not even direct employees of the con-

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[19] Plaintiffs also submitted the testimony of James Cross, Purchasing Manager at Sohio, chief Sohio negotiator of the construction contracts and negotiator of the BP-Sohio Supervisory Agreement. Mr. Cross testified as to when BP was required to inform Sohio of agreed design modifications under the terms of the BP-Sohio agreements. However, as mentioned above, the Court finds BP's knowledge and actions chargeable to Sohio; whether BP acted properly in representing Sohio is not an issue before this Court. The Court also disregards Mr. Cross's testimony regarding the intent of the warranty provisions in the Sohio-Avondale contracts, sustaining Avondale's objections that the contract is the best evidence of its contents. In addition, Mr. Cross's testimony is replete with legal conclusions and matters of contract interpretation. The Court does not find the contract to be ambiguous, so as to permit the admission of parole evidence to explain its terms.

tracting party, Sohio. Considering the totality of the circumstances surrounding the discussions and exchanges as a whole and not extracting them out of the context of the many conferences of this type, they were simply resolutions of particular problems in construction techniques, nothing more.

In addition to examining the evidence in light of plaintiffs' contention that Avondale modified the construction contract warranties, the Court is called upon to consider whether the Sohio-Avondale contract settlement of 1981 forecloses this litigation. On the settlement issue, the Court heard the testimony of Mr. Meric, who negotiated settlement of the guaranty matters on Avondale's behalf, and Richard Whiteside, Manager of Marine Engineering for Sohio and the Sohio Liason Project Coordinator for the Construction of Vessels, who negotiated guaranty items on behalf of Sohio.

In light of Sohio's asserted lack of expertise in vessel construction, it is curious that Sohio did not obtain BP's input in negotiating close-out payments under the contracts. Nevertheless, plaintiffs contend that the negotiation and settlement of outstanding contract matters in 1981 could not have included future claims, and particularly potential claims for stress fractures, because of Sohio's lack of actual knowledge of matters transpiring in the August meetings and of the implications of the stress fracture problem.

As to these contentions, Mr. Meric testified with reference to Joints Exhibits 9, 10 and 12, demonstrating the innumerable items in dispute as between Avondale and Sohio, including warranty matters, a spare parts settlement, and liquidated damage claims for late delivery of

the vessels. The Court also took notice of documents of unknown content approximately eighteen inches high demonstrating the quantum of correspondence exchanged in the course of settlement negotiations. The Court also found significant Mr. Meric's testimony of the parties' discussions that once the settlement agreements were signed, everything would be put to rest. Specifically, Mr. Meric testified there would be "no point otherwise;" his understanding was that whatever Avondale was obligated to do would be satisfied by the settlement agreement and that Mr. Whiteside understood this intent.

On cross-examination of Mr. Meric, plaintiffs attempted to show that no claims other than warranty, spare parts and liquidated damage claims were discussed. However, the Court draws no inference from the failure to discuss any other types of claims, including potential claims regarding stress fractures. First, the Court fully imputes to Sohio BP's knowledge regarding the stress fracture problem and its potential occurence five to six years after operation of the vessels. Second, the occurence of such stress fractures would be understood by such knowledgeable parties as BP, Avondale and Sohio to fall within the general category of a warranty item. That the particular Sohio representative negotiating close-out of warranty and other contract matters did not have actual knowledge of the stress fracture problem does not preclude a finding that Sohio had constructive knowledge of such claims, in light of the actual knowledge of its contract representative and technical advisor.

Mr. Whiteside testified on Sohio's behalf that he was the principal person involved in resolving the guaranty

items and that his negotiating authority was limited to guaranty matters. However, Mr. Whiteside admitted he got management approval for the final figures and the confirming telex he sent, and again, the Court must conclude the settlement was intended to close out all contract matters. See Joint Exhibits 15 and 16. Mr. Whiteside further testified that there was no specific discussion of any future claims. Nevertheless, the parties have stipulated to Sohio's knowledge and acceptance of the time limitations imposed upon the warranties under the contract. Implicit in acceptance of warranty time limits is a recognition that possible future claims would be foreclosed.

The Court also admitted into evidence a memorandum from Mr. Whiteside dated August 6, 1982 recording "all damage or potential damage claims encountered during normal vessel operation," which memorandum was sent to Mr. A. E. Doller of Sohio's insurance department. See Defendant Exhibit 42. Although the cover memorandum was dated August 6, 1982, its attachments show dates for discovery of particular hull structural defects, including hull fractures, prior to December 1981. Accordingly, Sohio was presumed to know that there were outstanding structural defects at the time of the settlement agreement and presumed to have intended that the settlement agreement would cover such matters. Mr. Whiteside also admitted to industry recognition that all large tankers experience structural cracking in service. Thus, the Court is satisfied that the witness had actual knowledge of his own at the time he negotiated the warranty settlement agreements. Moreover, when asked if this is a maintenance item, the witness responded, "that's the only way you can repair it," which the Court accepts in the context of the ques-

tion and response as an admission of the regular occurrence of such items.

The Court is mindful that certain structural fractures mentioned in the record, see Defendant Exhibit 42, predate the fractures that are the subject of this litigation and accordingly are not the fractures at issue in this suit. Nevertheless, the Court finds that as a general proposition, Sohio was chargeable with knowledge of the potential for occurrence of such problems and is charged with understanding, if indeed it did not actually understand, that the contract settlement foreclosed any further claims for structural defects.

The Court further finds the settlement was supported by consideration. At the time settlement negotiations commenced, the contract hold back fund amounted to $3,131,689.30. See Joint Exhibits 9-10. The Court finds that it was subsequently agreed Sohio would retain $2,394,346.02 of that amount after contract close out negotiations, leaving a difference of $737,343.28 owed Avondale. It was further agreed that Sohio would receive a spare parts adjustment credit of $21,700.23, see Joint Exhibit 15, such that Sohio would owe Avondale $715,643.02. See Stipulation No. 56. In addition, the parties agreed to a settlement of Sohio's liquidated damage claims against Avondale, with Sohio retaining $697,500.00. See Joint Exhibit 15. Thus, Avondale relinquished claim to more than $3,000,000 in funds withheld by Sohio.

In conclusion, after listening attentively to the testimony of all parties involved in the confection of the settlement and taking into consideration the responses and demeanor of the witnesses on the stand, the Court is un-

equivocally of the opinion that it was the intent of the parties to fully compromise, settle and put to rest all claims resulting from the construction of the vessels, as confirmed by the exchange of telexes.[20]

Conclusions of Law

This Court has subject matter jurisdiction by virtue of the parties' diverse citizenship. Plaintiffs have also alleged maritime tort actions within this Court's admiralty jurisdiction.

The Court has applied New York law to resolve the issues stemming from the alleged express warranty and the alleged settlement of all matters under the Sohio-Avondale contracts, in light of Article 22(e) of the Sohio-Avondale contracts, which states, "[T]he validity, enforcement and interpretation of the Contract shall be governed by the laws of the State of New York." However, the Court has applied maritime law to the question whether plaintiffs and intervenor have stated claims for maritime tort actions.

The Court concludes as a matter of law that plaintiffs and intervenor have not proved by a preponderance of the evidence that a warranty emanated from the August 1976 meetings, having considered the evidence of both oral rep-

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[20] The voluminous depositions submitted by the parties obscure the real issues. The testimony of the witnesses covered tangential matters unrelated to the focal points of the bifurcated trial and Avondale's motion for summary judgment. Avoiding a ruling at this stage in the proceedings would only permit further obfuscation. Sometimes, a trial judge has to bite the bullet. Accordingly, the Court holds the parties intended to put the construction contracts to rest.

resentations and written statements. A warranty is a promise that a proposition of fact is true. See Black's Law Dictionary, p. 1757. It is "an undertaking or stipulation, in writing or verbally, that a certain fact in relation to the subject of a contract is or shall be as it is stated or promised to be." *Id.* at p. 1758. Specifically, New York law defines an express warranty to include "[a]ny affirmation of fact or promise by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain." N.Y.U.C.C. § 2-313(a)(1)(a) (McKinney's 1964).

The Court finds no warranty was extended in this case. Construed in a light most favorable to the Sohio interests, the evidence shows discussion of a perceived technical problem, similar to innumerable other discussions, wherein the parties worked together to come to a mutually satisfactory resolution of a problem. The Court finds no promise that stress fractures would not occur, but rather an exchange of ideas and proposed solutions as between two knowledgeable entities, to resolve a perceived difficulty in the best workable manner. The Court is convinced that the statements constituted at most expressions of opinion by Avondale representatives and discussions with BP representatives of sufficient technical knowledge to exercise their own independent judgment as to what action should be required of Avondale. *See Royal Business Machines, Inc. v. Lorraine Corp.*, 633 F.2d 34 (7th Cir. 1980) (construing Indiana Law). Accordingly, the Court also declines to hold that the representations induced BP's continued satisfaction with Avondale, and thus became part of the bargain, in light of BP's exercise of independent judgment.

Nevertheless, even if this Court determined, which it does not, that the Avondale representatives warranted against the occurrence of stress fractures, such warranty could not be enforced by the Court due to the parties' failure to satisfy the contracts' writing requirements.[21] Such writing requirements are valid under New York law. *See* N.Y.U.C.C. § 2-209(3); N.Y. General Obligations Law § 15-301(1). *See also California Union Ins. Co. v. Bechtel Corp.*, 473 So. 2d 861 (La. App. 4th Cir.), *writ denied*, 477 So. 2d 1128 (La. 1985).

There was no waiver of the writing requirement. Such a waiver may be found where circumstances show an unequivocal agreement to waive a writing requirement or reliance by one party upon an oral modification. *See Elmsford Sheet Metal Workers, Inc., v. Shasta Indus., Inc.*, 477 N.Y.S.2d 391 (N.Y. Sup. 1984); *Nassau Trust Co. v. Montrose Concrete Prods. Corp.*, 436 N.E.2d 1265, *reargument denied*, 439 N.E.2d 1247 (N.Y. 1982). However, there is conspicuously absent from this case an indisputable mutual departure from the writing requirements of the contract so as to permit a finding of enforceable oral war-

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[21] The Court finds distinguishable the cases cited by plaintiffs for the proposition that the writing requirement would be satisfied by the August 1976 conference notes. For example, the minutes of a defendant's meeting authorizing a sale by the defendant corporation have been held to satisfy the statute of frauds. *See Church of God of Prospect Plaza v. Fourth Church of Christ*, 431 N.Y.S.2d 834, 837 (N.Y. Sup. 1980), *aff'd*, 426 N.E. 2d 480 (N.Y. 1981). However, the minutes were generated by the party against whom their enforcement was sought. Moreover, the circumstances surrounding the transaction showed no intent to reserve the effectiveness of the agreement to sell until a formal contract was signed. There is no similar lack of intent to comply with the construction contracts' writing requirements discernible from the evidence in this case.

ranty. Moreover, as mentioned briefly above, the evidence fails to demonstrate BP's reliance upon Avondale's oral statements, assuming those statements were in fact warranties, so as to estop Avondale's enforcement of the writing requirement. The testimony of the witnesses and the exhibits clearly show BP's experience, BP's active participation in dealing with the stress fracture problem and BP's knowing acceptance of technical arguments and opinions furthered by Avondale. The absence of reliance is further demonstrated by BP's having forced certain technical construction modifications, to which modifications Avondale agreed. If anything, Avondale's acceptance of the technical modifications insisted by BP emphasizes BP's refusal to rely blindly upon empty assurances, and as stated above, militates against a finding that any warranty was made in the first place.

Viewed realistically, the arguments of the Sohio interests are an attempt to alter the warranty set forth in the construction contracts and the limitations applicable to those warranties. However, the evidence is absolutely devoid of indication that events transpiring at the August 1976 meetings resulted in a new and separate contract based upon mutual promises with adequate consideration. *See Bakhshandeh v. Am. Cyanamid Co.*, 185 N.Y.S.2d 635, 638 (N.Y. Sup. 1959), *aff'd*, 169 N.E.2d 188 (N.Y. 1960). Moreover, even if BP understood a warranty modification to have resulted from the August meetings or a new contract pertaining to the stress fractures alone to have resulted, Avondale reasonably perceived there to be no agreement to alter the underlying contracts and warranties contained therein. Accordingly, notwithstanding

BP's intent, there is no enforceable contract. *See Gupta v. University of Rochester,* 395 N.Y.S. 2d 566 (N.Y. Sup. 1977).

The Court also finds persuasive the authority cited by Avondale for the proposition that any warranties emanating from the August meetings would be so vague as to be unenforceable. *See Joseph Martin, Jr., Delicatessen, Inc. v. Schumacher,* 417 N.E.2d 541 (N.Y. 1981). It would defy rationality to find a general warranty, without limitation in scope or time, that no stress fractures would occur on the Sohio vessels, particularly in light of the absence of consideration.[22]

The Sohio interests encounter another hurdle in the form of the December 1981 settlement of the construction contracts and the Court holds the settlement bars plaintiffs' causes of action. Under New York law, an accord and satisfaction exists where there is an agreement between two parties whereby one party agrees to give or perform and the other party agrees to accept the stipulated performance in discharge of an unresolved obligation or an outstanding claim. *See, e.g., Stahl Management Corp. v. Conceptions Unlimited,* 554 F. Supp. 890 (S.D.N.Y. 1983);

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[22] Similarly, the Court rejects the contention that the original one-year warranty limitation in the Sohio-Avondale contracts is inapplicable to any alleged subsequent contractual modifications. As Sohio admits, the parties were well aware that any structural cracks might not appear until the vessels had been in service for at least six years. Thus, the Court disagrees that the warranty limitation is "manifestly unreasonable" because it is sought to be applied to a latent defect not discoverable within the contractual time limitation on the warranty. The problem was fully known to and anticipated by BP. *See also* N.Y.U.C.C. § 2-316(2); *Zicari v. Joseph Harris Co.,* 304 N.Y.S.2d 918 (N.Y. Sup. 1969), *appeal denied* 258 N.E.2d 103 (N.Y. 1970).

Pepper's Steel & Alloys, Inc. v. Lissner Minerals & Metals, Inc., 494 F. Supp. 487 (S.D.N.Y. 1979). The presence of outstanding claims are readily discernible from the record: Sohio was holding funds exceeding $3,000,000; Avondale computed that $1,000,000 of that amount should be paid to it, whereas Sohio contended it should be entitled to retain the entire $3,000,000 and receive an additional $40,000.

The disputes between the parties and the ultimate settlement encompassed warranty matters and liquidated damages for delays in deliveries, and the Court has absolutely no hesitation in holding that the potential for the occurrence of stress fractures five to six years after service created an outstanding claim actually known and perceived as such by BP and at least constructively known to Sohio. The Court's conclusion that all claims have been settled ensues regardless of whether the modified warrantes may have existed or whether new, separate and independent warranties are asserted. The Court further holds that the settlement encompassed past, present and future claims whether known or unknown, notwithstanding Sohio's contention that it did not contemplate such a settlement. The exchange of telexes between the parties clearly demonstrates settlement of "any and all" claims under the contract. Moreover, this was a settlement agreement negotiated by commercial parties with substantially equal bargaining power and there is no policy furthered by vitiating the settlement. *See Ingram Corp. v. J. Ray McDermott & Co.*, 698 F.2d 1295 (5th Cir. 1983).[23]

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[23] The Court in *Ingram* gave effect to settlement stating that it did not matter whether the parties may not have known of or

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Having thus disposed of any claims for alleged breach of warranty, the Court turns to whether there survived any claims for maritime tort liability for negligent design and construction of the vessels or for strict liability.

In determining whether plaintiffs and intervenor have a maritime tort claim for negligent design and construction, the Court is bound by *Jig the Third Corp. v. Puritan Marine Ins. Underwriters Corp.*, 519 F.2d 171, *reh. denied* 522 F.2d 1280 (5th Cir. 1975) (Court affirming jury verdict that vessel sinking resulted from defect in design or construction and that defendant was negligent in the design or manufacture of the vessel). *Jig III* bars this Court from holding that the construction contract warranties subsumed the tort of negligent design and manufacture. Rather, the Court may only consider whether the ship building contract itself prescribes a specific and exclusive remedy in event of damage to the vessels in question.

The Court holds the contractual warranty limitation set forth in the Sohio-Avondale contracts sufficiently broad to exclude any maritime tort remedies. The Avondale contracts specifically prescribe that the warranties set forth in the contracts are exclusive of any other *remedy*, whereas the contract limitations in *Jig III* addressed solely whether there remained any warranties other than as set forth in the contract. Thus, the Sohio-Avondale contract precludes the Sohio interests' claim for negligent

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considered all possible claims. The instant case is an even stronger one for enforcement of the settlement, where such potential claims were known. The parties' sophistication and knowledge is another pivotal factor in giving effect to settlement. See 698 F.2d at 1322.

manufacture and design. This holding is consistent with the concerns expressed in *Jig III* that limitations of liability in the commercial context are enforced as between parties of relatively equal bargaining power who can be held to have considered the relative costs of insuring against negligent design and manufacture and have incorporated this concern into the contract. The Sohio and Avondale interests are clearly parties with the commercial and technical expertise to have considered such ramifications, and the participation and advices of BP during precontract negotiations enforces this conclusion.

The Court interprets *Jig III* as limited to waiver of claims for negligent design and manufacture, and accordingly finds no controlling authority in the Fifth Circuit addressing the viability of the claims against Avondale for strict liability. Accordingly, the Court finds persuasive *East River SS Corp. v. Delaval Turbine, Inc.*, 752 F.2d 903 (3d Cir.), *cert. granted*, — U.S. —, 106 S. Ct. 56 (1985), wherein the Court held, applying general maritime law, that strict liability claims in cases of property damage require consideration of the risks inherent in the asserted product defects and examination of circumstances surrounding the losses before the manufacturer may be held liable in strict liability for property damage. Thus, damage to a defective product is not actionable in tort under strict liability unless the design defect creates an unreasonable risk of harm to persons or property other than the product itself. 752 F.2d at 908, *citing Seely v. White Motor Co.*, 403 P.2d 145 (Cal. 1965).[24]

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[24] The *Seely* decision has been embraced by the New York courts. *See Cayuga Harvester v. Allis-Chalmers Corp.*, 465 N.Y.S.

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Under the guidance of *Delaval,* the Court has determined that plaintiffs neither allege nor have shown a sudden or calamitous event triggering the manifestation of a defect and resulting damage, such as might be present in an explosion or fire. As in *Delaval,* the defects in question involved gradual deterioration rather than imposing a risk of sudden or calamitous injury to persons and property. Thus, the type of risks at issue here concern only the charterers' expectations as to the commercial suitability of the product rather than implicating a manufacturer's obligation to place safe products in the stream of commerce. *See* 752 F.2d at 909. For these reasons, the Court holds no maritime tort claim for strict liability exists under the circumstances of these cases.

Notwithstanding the above conclusions that no maritime tort causes of action for negligence or strict liability here exist, the Court further holds that any such causes of action are presently barred by the contract settlement. The Court finds the negotiation of the contract close out settlement and the exchange of significant consideration for this settlement to constitute a pivotal departure from the facts under consideration in *Jig III.* Thus, *Jig III* would not require litigation of the maritime tort claims here at issue, even if the warranty limitations were insufficient to preclude the claims. *See General Intermodal*

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2d 606, 620-21 (N.Y. Sup. 1983). *See also Butler v. Pittway Corp.,* 770 F.2d 7 (2d Cir. 1985). However, the Court finds the outcome of the strict liability and negligent design and manufacture issues governed by general maritime law, with state law merely persuasive.

Logistics Corp. v. Mainstream Shipyards & Supply, Inc., 666 F.2d 129, 133 (5th Cir. 1982) (*Jig III* not applicable to release of claims under ship repair contract; court acknowledging "cogent dissent" in *Jig III*).

The Court further concludes that the claims of SPC shipping as time charterer are barred by the holdings of *Robins Drydock & Repair Co. v. Flint*, 275 U.S. 303, 48 S. Ct. 134, 72 L.Ed. 290 (1927), as recently reaffirmed in *State of Louisiana ex rel. Guste v. M/V TESTBANK*, 752 F.2d 1019 (5th Cir. 1985). The Court distinguishes the position of SPC Shipping as time charterer from that of the Shipco companies who stand as bareboat charterers with a certain proprietary interest absent in the case of SPC Shipping.[25]

There remain the legal contentions of AEG Telefunken raised in its motion for judgment on the pleadings. The Court concludes the motion of AEG is well founded, due to plaintiffs' concession that they do not have a cause of action remaining for breach of warranty under the contracts, see note 1 supra; the effect of the contract settlement; and the holdings of *Jig III*, *Delaval* and *Robins Drydock*.

First, the Court holds that the release of Avondale under the contract settlements, without a reservation of rights as against AEG, effected a release of AEG. *See*

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[25] In view of the Court's holdings on the warranty issues, the Court finds it unnecessary to address Avondale's arguments that the absence of privity between Avondale on the one hand and the Shipco Companies and SPC Shipping on the other bars plaintiffs' recovery for breach of warranty.

La. Civ. Code of 1870 art. 2203. *See also Guarisco v. Penn. Cas. Co.*, 24 So. 2d 678, 679 (La. 1945); *Miami Parts & Spring, Inc. v. Champion Spark Plug Co.*, 402 F.2d 83 (5th Cir. 1968).[26] Moreover, to the extent that plaintiffs assert a cause of action in warranty against AEG, pretermitting the absence of privity between plaintiffs and intervenor SPC Shipping on the one hand and AEG on the other, the Court concludes the contract settlements terminate all warranty claims in connection with the Sohio vessels.

Likewise, the Court concludes that the contracts would not in any event afford greater warranty rights against AEG than would be available against Avondale. Thus, the Court reiterates its cognizance of plaintiffs' admission they have no remaining warranty rights under the Sohio-Avondale contracts and its prior holdings as to the impact of the warranty limitations, which are deemed applicable to the claims against AEG.

The Court also holds that the presence of a maritime tort action against AEG is governed by the same standards applicable to Avondale and accordingly applies to the claims against AEG the holdings above under *Jig III* and *Delaval*. Similarly, the *Robins Drydock* rationale precludes the claims of SPC Shipping against AEG.[27]

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[26] Plaintiffs have not demonstrated to the Court's satisfaction that New York law would govern the liability of AEG herein, inasmuch as AEG is not a party to the Avondale-Sohio contracts containing the choice of New York law provision. Nor is the Court satisfied that a different result would obtain under New York law.

[27] As indicated above, the Court has chosen not to address the effect of the absence of privity between plaintiffs and Avon-

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The consolidated cases are accordingly dismissed with prejudice, with plaintiffs and intervenor to bear all costs, the Court having determined there was no modification of the construction contract warranties; that all claims arising out of the vessel construction were settled as a result of the Sohio-Avondale negotiations in 1981, that plaintiffs have no maritime tort causes of action against Avondale and AEG Telefunken as a matter of law; and that the claims of plaintiff SPC Shipping as time charterer are barred by *Robins Drydock* and its progeny.

The Clerk of Court is hereby ordered to enter judgment accordingly.

New Orleans, Louisiana, this 24th day of March, 1986.

/s/ Charles Schwartz, Jr.
UNITED STATES DISTRICT
JUDGE

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dale, in light of the plethora of other grounds for dismissal of plaintiffs' and intervenor's claims. Similarly, the Court refrains from addressing the privity arguments as to AEG.

APPENDIX

The Rutter, Telfer and Harbottle depositions constitute plaintiffs' best evidentiary offerings regarding the possible expression of a warranty. However, the testimony of those witnesses falls short of establishing that a warranty was given.

The specific testimony of *Mr. Rutter,* which construed in its best light, might tend to establish a warranty, is as follows:

> Q. . . . Do you recall whether . . . any representative of Avondale did contact you in London after [Mr. Harbottle discussed the BRITISH INVENTOR problems with Avondale]?
>
> A. Well, I recall, . . . discussing with Mr. Poulin the problem that we had found on BRITISH INVENTOR, and why we were concerned with their ship, in particular and what we thought had caused the problem at that time, and asking them to verify and check, do the necessary calculations, to insure that such an occurrence would not happen on their ships in the life, the intended life of the ship. . . . The intended life of the ship was 20 years.
>
> Q. What was your understanding from discussions with Mr. Poulin as to the actions Avondale was going to undertake?
>
> A. Well, I understood that he was going to model the connections on the Avondale ships . . . .
>
> . . . .
>
> Mr. Poulin told me that he didn't think that they had a problem because although the longitudinals were similar type, they had improvements in their design which certainly reduced the possibility of failures of this type occurring.

(Rutter Deposition pp. 40-42). Further testimony was:

> I recall telephone conversations during which Avondale had taken a strong stance that they were now satisfied that the problems that we had experienced on the BRITISH INVENTOR would not occur during the life of their tankers, and they were giving reasons for that . . . .
>
> They also *felt* that the brackets on their ships were superior because they had radiused [sic] endings. They *felt* that the connections were superior because the cut-outs on the brackets and flat bars were of better shape, and generally they *didn't believe* that they had a problem.

(Rutter Deposition pp. 44-45) (emphasis added).

Mr. Rutter also testified generally to the occurrence of "telephone conversations with Avondale," (Rutter Deposition p. 79, lines 6-7), regarding the results of BP's comparison of Avondale tankers with other tankers in the BP fleet, which took place between June 1976 to early December 1976, with a final conversation in early December of 1976 with Mr. Poulin. In regard to BP's empirical work, Mr. Rutter testified as follows:

> Mr. Poulin was very confident that this work that we had done (A) was empirical and that . . . it was based on ships with mild steel employed in the relevant details, and that the Avondale ship employed higher tensile steel and therefore the allowable stresses would be different to what we were talking about. In other words, that there was not a problem on their ships despite this work that we had done. He also reiterated the other factors which I have mentioned before and which I would like to emphasize I had spoken to him about on a number of occasions, so while I was not at the meeting similar conclusions had

> already been mentioned to me on the phone . . . by Mr. Poulin.

(Rutter Deposition pp. 82-83).

The specific testimony of *Mr. Harbottle,* which construed in its best light, might tend to establish a warranty is as follows:

> [Q. When asked about the positions of Mr. Mabson and Mr. Poulin at an initial meeting between the witness and those Avondale representatives in June of 1976]:
>
> A. They started out, Darold Poulin started out by expressing confidence in their structure; they *felt* that they had done sufficient study and work on their structure to be very confident that the problem didn't exist. He even suggested with the few details we did have at that time that had we built out ships under his guidance, we wouldn't be having problems on our ships.
>
> . . . [I]n, the end, I seem to recall Al Mabson really arbitrated between the two of us and suggested to Darold that even if Avondale were very confident, because the client was concerned, *perhaps* they should do a bit of work to alleviate the client's fears. . . . [T]he meeting ended with that proposal being put forward, and Avondale going away to think about it . . . .

(Harbottle Deposition p. 37) (emphasis added).

Mr. Harbottle recalled two further conversations with Mr. Poulin in June:

> [First], they had thought about the problem over the weekend and they were going to do some investigation of their record and further calculations on their structure down to the point where the particular detail that had caused us a problem

> on our vessels was involved; and suggested they were going to do a further finite element analysis, make up a computer model for the detail, and run that through the computer, again under the belief that they didn't need to do it; they didn't require [sic] to do it but as the client was concerned, they would carry out such an exercise to alleviate our fears.
>
> [Secondly], they indicated that they did not intend stopping fitting these brackets while the investigation was going on.

(Harbottle Deposition pp. 40-41).

And as to the August 1976 meeting, Mr. Harbottle testified that Mr. Poulin was quite clearly the Avondale spokesman, (Harbottle Deposition p. 48), and that:

> [Poulin] indicated that, again from the outset, that he didn't feel that any actions had been required but because the client was concerned, they had looked at their overall structure again throughout the ship; they had specifically reviewed the areas where we felt there was problems on their vessel [sic] and they had also done preliminary review . . . of the BP vessel in the problem areas.

(Harbottle Deposition pp. 48-49). Further testimony:

> Q. What was Avondale's position at the meeting as presented by Mr. Poulin?
>
> A. Darold didn't really change throughout. He was very confident and expressed his feeling that there was no, absolutely no problem with the Avondale ship, and he used the comparisons in his little summary to even imply that again had we built our own ship at his guidance, we wouldn't have a problem on our ship.

(Harbottle Deposition pp. 50-51).

Mr. Harbottle's testimony of the factors distinguishing the Sohio vessels from the BP vessels, as pointed out by Mr. Poulin, matches that of Mr. Poulin. (Harbottle Deposition p. 51). Mr. Harbottle further stated that Mr. Poulin's position with regard to the utilization of high tensile strength steel

> formed one of the basic parts of his argument really. Because Avondale were using high tensile steel, the structure could absorb slightly higher stresses than would be acceptable with mild steel. In other words, I guess he was saying the allowable stress levels were increased with the use of high tensile steel.

(Harbottle Deposition p. 52). Further testimony was as follows:

> Q. [W]hat representations, if any, were given by Mr. Poulin to BP at the meeting of August 17-18, 1976?
>
> A. Again, they expressed total confidence in their structure and cited these examples that I have said and I seem to recall a computer printout as part of their presentation, but because of all of that, because of the factors in those documents, they re-expressed their confidence in the structure.

(Harbottle Deposition pp. 54-55). Significantly, Mr. Harbottle further stated:

> [W]e became convinced during that presentation that Avondale had, in fact, done sufficient work to convince themselves and to confirm their viewpoint that, in fact, there were no structural problems related to over stressing in their ships, and we ended up accepting their argument, presentation, and we decided really we did not need to have recall to Sohio.

(Harbottle Deposition p. 56).

Subsequently, Mr. Harbottle was involved in the agreed upon actions by "simply insuring that they were carried out physically on the ship through the use of our own inspectors . . . ." (Harbottle Deposition p. 65).

The deposition testimony of *Ian Telfer,* which construed in its best light, might support a warranty, is as follows:

> Q. What was decided as to the course of action to take?
>
> A. The course of action was as described in these minutes here of date 25 August.

(Telfer Deposition p. 135). When asked specifically as to matters discussed in the meeting, Mr. Telfer testified:

> [Darold Poulin] said that they had carried out further analyses and in great detail and they were satisfied with what they had gotten. I also remember them pulling our legs by saying that they could have told us that the BRITISH EXPLORER would fracture.

(Telfer Deposition p. 138, lines 16-23).

> The discussion then went on, alright, you are assuring, you, Avondale, are assuring us that you have fully calculated this, that you have taken into account what we have said to you about the EXPLORER and you are saying that you are quite satisfied with the structure. But, your calculations didn't include anything to do with flame cut edges and workmanship and we must ask you to grind these edges because in our opinion we have not fully exonerated the flame cut edge in this instance nor did we ever. So they agreed at that date to grind the face of the longitudinals where things were being butted to them and in the cargo tank area.

(Telfer Deposition p. 139, line 13 to p. 140, line 7).

With regard to what was agreed upon in the meeting, Mr. Telfer testified that modification of the vessels was agreed upon, (Telfer Deposition p. 168), and that the group felt that this method of construction alleviated the construction problems that existed on the BRITISH EXPLORER. (Telfer Deposition p. 169).

None of the foregoing testimony establishes either an agreement to alter the contract terms or a new specific promise by Avondale, supported by consideration, to the effect that stress fractures would not occur.

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

SHIPCO 2295, INC.	CIVIL ACTION
VERSUS	NO. 82-5650
AVONDALE SHIPYARDS, INC.	SECTION "A"

JUDGMENT

(Filed February 27, 1986)

Considering the Court's written Order and Reasons on file herein, accordingly;

IT IS ORDERED, ADJUDGED, AND DECREED, that there be judgment in favor of defendant Avondale Shipyards, Inc. and against plaintiff Shipco 2295, Inc. and intervenor SPC Shipping, Inc., dismissing the claims of plaintiff and intervenor with prejudice, plaintiff and intervenor to bear all costs.

New Orleans, Louisiana, this 27th day of February, 1986.

/s/ Loretta G. Whyte
CLERK

APPROVED AS TO FORM:

/s/ Charles Schwartz, Jr.
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

SHIPCO 2295, INC. ET AL	CIVIL ACTION
VERSUS	NO. 83-2494
AVONDALE SHIPYARDS, INC.	SECTION "A"

JUDGMENT

(Filed February 27, 1986)

Considering the Court's written Order and Reasons on file herein, accordingly;

IT IS ORDERED, ADJUDGED, AND DECREED, that there be judgment in favor of defendant Avondale Shipyards, Inc. and against plaintiffs Shipco 2295, Inc., Shipco 2296, Inc., Shipco 2297, Inc., and Shipco 2298, Inc., and intervenor SPC Shipping, Inc., dismissing the claims of plaintiffs and intervenor with prejudice, plaintiffs and intervenor to bear all costs.

New Orleans, Louisiana, this 27th day of February, 1986.

/s/ Loretta G. Whyte
CLERK

APPROVED AS TO FORM:

/s/ Charles Schwartz, Jr.
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

SHIPCO 2295, INC., ET AL	CIVIL ACTION
VERSUS	82-5650
AVONDALE SHIPYARDS, INC., ET AL	NO. 84-4361
	SECTION: "A"

JUDGMENT

(Filed February 27, 1986)

Considering the Court's written Order and Reasons on file herein; accordingly,

IT IS ORDERED, ADJUDGED AND DECREED, that there be judgment in favor of defendants Avondale Shipyards, Inc. and Allgemeine Elektricitats Gesellschaft Telefunken and against plaintiffs Shipco 2295, Inc., Shipco 2296, Inc., Shipco 2297, Inc., Shipco 2298, Inc. and SPC Shipping, Inc., dismissing plaintiffs' claims, with prejudice, plaintiffs to bear all costs.

New Orleans, Louisiana, this 27th day of February, 1986.

/s/ Loretta G. Whyte
CLERK

APPROVED— AS TO FORM:

/s/ Charles Schwartz, Jr.
UNITED STATES DISTRICT JUDGE